Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 197

No. 76-1051

ROBERT CRABBE AND KENNETH CAMPBELL,
Petitioners,

v.

GLEN D. HORD,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

ROBERT G. VIAL and
JEFFREY S. LYNCH,
VIAL, HAMILTON, KOCH, TUBB,
KNOX & STRADLEY,
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No. .....

ROBERT CRABBE AND KENNETH CAMPBELL,
Petitioners,

v.

GLEN D. HORD,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioners, ROBERT CRABBE and KENNETH CAMPBELL, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas entered in this proceeding on April 9, 1976, which judgment and opinion was affirmed by the Supreme Court of Texas on November 3, 1976, when said court denied Petitioners' Application for Rehearing. The notice of appeal from such judgment was filed with the Court of Civil Appeals for the Second Supreme Judicial District of Texas on November 23, 1976, and appears in the appendix hereto.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas is reported in 536 S.W. 2d 409 (Tex. Civ. App., Ft. Worth, 1976, writ ref., n.r.e.) and appears in the appendix hereto. No opinion was rendered by either the Supreme Court of Texas or Seventeenth Judicial District Court in and for Tarrant County, Texas.

JURISDICTION

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas was entered on April 9, 1976. A timely Application for Rehearing was filed on April 16, 1976, and overruled on May 14, 1976. A timely Application for Writ of Error was filed with the Supreme Court of Texas on or about June 11, 1976, said Application was refused on September 29, 1976. A timely Application for Rehearing was filed with the Supreme Court of Texas on or about October 14, 1976, said Application was overruled on November 3, 1976. A timely notice of appeal was filed on November 23, 1976. This Petition for Certiorari was filed within ninety (90) days of the overruling of Petitioner's Application for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2) and § 1257(3).

QUESTIONS PRESENTED

1. Whether the failure of the District Clerk of Tarrant County, Texas to send notice of the Default Judgment to Petitioners as required by Rule 239a, Texas Rules of Civil Procedure, resulted in a violation of Petitioners' right of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Whether the participation of Court of Appeals Associate Justice Joe Spurlock at the trial court and appellate court

proceedings relating to this matter denied Petitioners a fair hearing before an impartial tribunal as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fourteenth Amendment to the United States Constitution, and the questions pertaining thereto are substantial. Section 1 of the Fourteenth Amendment states:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arises out of a collision which occurred on June 14, 1972, in the City of Irving, Dallas County, Texas, between a truck owned by Petitioner, Kenneth Campbell (hereinafter sometimes referred to individually as "Campbell" and collectively as "Petitioners") and driven by Petitioner, Robert Crabbe (hereinafter sometimes referred to individually as "Crabbe" and collectively as "Petitioners") and an automobile owned and driven by Respondent, Glen D. Hord, (hereinafter sometimes referred to as "Hord" and "Respondent"). Hord filed suit on October 6, 1972, in the District Court of Tarrant County, 17th Judicial District, seeking damages for personal injuries allegedly sustained in the collision, and naming originally as Defendants therein Crabbe and Melton Truck Lines, Inc. (hereinafter sometimes

referred to as "Melton"), lessee of the truck owned by Campbell. That lawsuit was numbered 17-15553-72 on the docket of the 17th Judicial District Court. Service of citation on Melton and Crabbe, both residents of Louisiana, was accomplished by service on the Texas Highway Commission on October 11, 1972, and the Commission forwarded copies of the citation and Petition to Melton and Crabbe. Melton thereafter obtained from Hord's attorney an indefinite extension of time to answer. On September 6, 1973, Hord filed his First Amended Petition adding Campbell as a Defendant and Campbell was thereafter served with citation on September 23, 1973. Throughout this period of time, representatives of Melton continued to negotiate with Hord's attorneys in an attempt to reach a settlement. On September 14, 1973, Hord's attorneys revoked the indefinite extension of time to answer, and requested for the first time that answers be filed by September 24, 1973. On September 28, 1973, Melton retained an attorney who prepared and filed an answer for Melton only, no answer being filed for Campbell or Crabbe. Neither Campbell or Crabbe were ever notified of the revocation of the indefinite extension of time to answer. Melton's answer contained a demand for jury trial, and Melton's attorney subsequently paid a jury fee.

On October 17, 1973, Hord's attorney, without notice to Campbell, Crabbe or Melton, moved for and obtained an order severing the action against Campbell and Crabbe from Cause Number 17-15553-72, leaving only Melton as a Defendant in the original action. The order granting a severance was signed by a former law partner of Hord's attorney, the Honorable Joe Spurlock, District Judge of the 96th Judicial District, sitting for the Judge of the 17th Judicial District Court. Simultaneously, Hord's attorney obtained a Default Judgment in amount of $57,000.00 from Judge Spurlock in the severed action, which was ultimately numbered as Cause

Number 17-22693-73. Despite Melton's prior jury demand, however, no writ of inquiry was awarded and the proof in the Default Judgment was not heard by a jury. No notice of the Default Judgment, prior to entry or after entry, was ever given to Melton or to Campbell or to Crabbe. The postcard notice required by Rule 239a, *Texas Rules of Civil Procedure*, was not sent, and Melton was not notified of the severance. On December 5, 1973, Cause Number 17-22693-73, was officially filed in the office of the District Clerk of Tarrant County and the Default Judgment entered in that cause was subsequently entered in the minute book. As a direct result of the District Clerk's failure to send the notice required by Rule 239a, *Texas Rules of Civil Procedure*, neither Campbell nor Crabbe had any notice of the Default Judgment within the time for filing a Motion for New Trial or to perfect an appeal by way of an Application for Writ of Error.

Upon learning of the existence of a Default Judgment, Crabbe and Campbell retained counsel and filed a Petition for a Bill of Review, a new and separate suit, on August 14, 1974, that cause being numbered as Cause Number 17-27355-74. The Bill of Review proceeding was transferred to the 96th Judicial District Court, the Court in which the Default Judgment had been previously entered. Upon the trial of the Bill of Review, the jury found in response to special issues that the failure of Campbell and Crabbe to answer the original lawsuit brought by Hord was not intentional or the result of conscious indifference, that the District Clerk failed to mail the notice of a Default Judgment as required by Rule 239a, *Texas Rules of Civil Procedure*, that Crabbe and Campbell had meritorious defenses to the cause of action asserted by Hord in the original lawsuit, and that the failure to present those defenses in the original lawsuit was a result of a mutual mistake between Campbell and Crabbe on the one hand and Hord's attorney on the other. Notwithstanding

the jury's answers to such special issues, the trial court disregarded the jury's answers and entered a Judgment Non Obstante Verdicto for Hord that a Bill of Review be denied and that the Default Judgment was valid and subsisting. Petitioners thereafter appealed to the Court of Civil Appeals for the Second Supreme Judicial District of Texas raising, in part, as a basis for appeal the failure of the District Clerk to send out notice of the Default Judgment as required by Rule 239a, *Texas Rules of Civil Procedure.*

In between the date of the entry of the Default Judgment and the filing of the Application for Bill of Review by Crabbe and Campbell, the Honorable Joe Spurlock became an Associate Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas (Fort Worth). Thus, Associate Justice Spurlock was potentially in a position to review a Judgment which he himself had entered. Three weeks prior to the oral submission of the appeal of the Bill of Review proceeding to the Court of Civil Appeals, Crabbe and Campbell forwarded for filing with the Court a Motion for Voluntary Recusal of Associate Justice Spurlock. On March 11, 1976, counsel for Crabbe and Campbell, received a letter from Lida Swanson, Clerk of the Court of Civil Appeals (Fort Worth), acknowledging receipt of the Motion for Voluntary Recusal, but stating:

> "This Motion has been presented to the Court and I am instructed by the Court not to file same and to inform you that Judge Spurlock has voluntarily recused in the case."

However, contrary to the above-mentioned letter, when counsel for Crabbe and Campbell appeared for oral argument, Associate Justice Spurlock was not only present, but he took his seat beside his fellow Justices, asked questions of counsel, and even made statements from the bench as

to his recollection of the events before the Court for review. The opinion of the Court of Civil Appeals, though it stated, "Spurlock, A. J., not participating," affirmed the trial court's denial of the Bill of Review of Crabbe and Campbell, and affirmed the Default Judgment, thus affording Associate Justice Spurlock the opportunity to prevent Crabbe and Campbell from setting aside the Default Judgment at two different levels of the proceeding.

Thereafter, an Application for Writ of Error was filed with the Supreme Court of Texas setting forth, in part, as a basis of appeal that Petitioners' rights to due process were violated by the District Clerk's failure to send out notice of the Default Judgment and the double participation of Associate Justice Spurlock in the proceedings. The Application for Writ of Error was refused by the Supreme Court of Texas. The Application for Rehearing was similarly filed with and overruled by the Supreme Court of Texas.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Whether the failure of the District Clerk of Tarrant County, Texas, to send notice of the Default Judgment to Petitioners as required by Rule 239a, *Texas Rules of Civil Procedure*, resulted in a violation of Petitioners' right of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

The right of Crabbe and Campbell to due process of law under the United States Constitution was violated as a result of the failure of the District Clerk of Tarrant County, Texas, to notify Petitioners that a Default Judgment had been entered against them as required by *Texas Rules of Civil Procedure*, Rule 239a.

In order to properly state the violation of due process in this case, a detailed analysis of the procedures available to attack Default Judgments in Texas must be discussed. Under Texas law, a party against whom a Default Judgment has been entered has three possible remedies.

The first possible remedy is a Motion for New Trial. Within thirty (30) days of the rendition of the Default Judgment, the defaulting party may move the Court that entered the Judgment for a new trial. *Texas Rules of Civil Procedule*, Rule 329b. During the first thirty-day period, the Court that rendered the judgment has jurisdiction to set aside the judgment. To be successful in a Motion for New Trial, the movant must show that his failure to answer was not intentional, or the result of conscious indifference on his part, but was due to mistake or accident. Secondly, the movant must establish a meritorious defense, i.e., allege in his Motion facts which in law would constitute a defense and support those facts with evidence proving prima facie the existence of such defense. Finally, the Motion must be filed at a time when the granting thereof will occasion no delay or otherwise work an injury to Plaintiff. 4 McDonald, *Texas Civil Practice*, §§ 18.10.2 - 18.10.3 (1971 rev. ed.) [hereinafter "McDonald"].

The defaulting party's second possible option is a direct attack on the Default Judgment by means of an Application for Writ of Error to a Court of Civil Appeals within six months after the rendition of the final judgment. *Tex Rev. Civ. Stat. Anno.*, Arts. 2249, 2249a, and 2255. A defaulting party's right to relief by Writ of Error is dependent upon his showing that the invalidity of the judgment is disclosed by the papers on file in the case. *Flynt v. City of Kingsville*, 82 S.W. 2d 934 (Tex. 1935). Failure to move for a new trial does not prevent the defaulting party from asserting his

right to relief by Writ of Error. The failure of the defaulting party to move for new trial, however, prevents him from asserting any errors other than those that may be raised by the Writ of Error, i.e., errors on the face of the judgment. Thus, for a defaulting party to properly preserve all questions he may wish to assert on appeal, he must properly preserve them by a timely Motion for New Trial.

The third possible option for the defaulting party is the Bill of Review. A Bill of Review is a separate and an independent equitable proceeding to set aside a judgment which is not void on the face of the record (thus, may not be successfully attacked by a Writ of Error) and which has become final by reason of the expiration of the periods allowed for a Motion for New Trial or appeal. See, *McDonald* at § 18.24. A Bill of Review is an action separate from the original action in which the default was granted but which must be brought in the court which rendered the judgment under attack. Bills of review are not looked upon with favor by Texas courts. See, *McDonald* at § 18.27.1. Such actions can be prosecuted successfully only when the Plaintiff can allege and prove certain relatively narrow fact propositions. Allegations in a Bill of Review complaint will usually be judged more strictly than those of an ordinary civil action. The Plaintiff in a Bill of Review must allege under oath, (1) a meritorious defense; (2) which he was prevented from asserting or making by the fraud, accident or wrongful act of the opposite party; and (3) unmixed with any fault or negligence of his own. *Alexander v. Hagedorn*, 226 S.W. 2d 996, 998 (Tex., 1950).

It is clear that the burden upon the defaulting party attempting to set aside the Default Judgment through the Bill of Review procedure is an onerous one. When compared with the burden on the defaulting party attempting to set

aside the Default Judgment by the new trial procedure, it is obvious that the Bill of Review burden is much more severe. Furthermore, only when a defaulting party acts within the time limits prescribed for a Motion for New Trial, may that party properly preserve questions and issues for appeal, at which time the defaulting party will have its first opportunity to be heard.

Texas Rules of Civil Procedure, Rule 239a states:

> "At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail a post card notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment."

It is clear that the Rule 239a notice requirement was designed and intended to protect a defaulting party. The defaulting party is entitled to have immediate notice of the Default Judgment entered against him, so that he may take the necessary action to protect himself within the various time limitations. Without such notice, a defaulting party might fail to act timely and be barred from asserting his statutory rights.

The requirements of Rule 239a that Crabbe and Campbell be notified immediately upon the rendition of the Default

Judgment is critical to this matter. Upon rendition of the Default Judgment various time limits began to run. Crabbe and Campbell had but thirty days to move for a new trial under Texas procedure to protest the entry of the judgment. Yet the thirty days expired without Crabbe and Campbell receiving the notice required by Rule 239a. Upon the expiration of the thirty days, Crabbe and Campbell's right to move for a new trial and preserve certain errors for appeal was forever lost through no fault of their own. At that point in time, Crabbe and Campbell were left with but two options — an action for Writ of Error, limited to an attack based on errors on the face of the judgment, or a Bill of Review, with its onerous burdens. Yet, the Clerk's inaction continued. After six months, Crabbe and Campbell still had not received notice of the Default Judgment. Another option was lost. Only the action for Bill of Review remained. Furthermore, at this point in time, because of the Clerk's failure Crabbe and Campbell lost all opportunity to be heard in the original action.

It is Petitioners' position that the Clerk's failure to send notice of the Default Judgment as required by Rule 239a was state action which deprived Petitioners of their right to due process of law, in that Petitioners were precluded from an opportunity to be heard on appeal. In *American Surety Co. v. Baldwin*, 287 U.S. 156 (1938), this court considered the question of whether failure to give the defaulting party notice prior to the entry of the judgment is a violation of due process. This Court held in *Baldwin, supra*, that although entry of a judgment without notice may have been a denial of due process, because the defaulting party had an opportunity to present its defenses on appeal no Constitutional violation occurred. This Court made it clear that due process requires that there be an opportunity to present

every available defense but that such opportunity to be heard need not necessarily occur prior to the entry of the judgment. The opportunity to be heard on appeal is sufficient to meet due process requirements. This view was followed in *Valley Bank of Nevada v. Skeen*, 366 F. Supp. 95 (N.D. Tex., 1973) *affirmed* 495 F. 2d 1371 (5th Cir., 1974), where it was held that the Constitutional right for an opportunity to be heard may be afforded after the entry of the Default Judgment. Thus, due process requires that at some stage of the proceedings a party must be given the opportunity to be heard even if that opportunity arises for the first time on appeal. Yet, the Clerk's failure to give Crabbe and Campbell notice of the entry of the Default Judgment in time for them to move for a new trial forever barred the Petitioners from the opportunity to be heard on appeal.

Petitioners were not given the opportunity to be heard before the entry of the judgment. Thus, the due process requirement of an opportunity to be heard could only have been met on appeal. Yet, the Petitioners were wholly deprived of an appeal by the Clerk's inaction. Furthermore, a Bill of Review with its onerous burdens was inadequate because it allowed only a collateral attack, and not a direct appeal. Consequently, Petitioners were never given the opportunity to be heard in the original action. It is clear, therefore, that the Clerk's inaction resulted in the loss to Petitioners of the right of an opportunity to be heard on appeal in the original action and, thereby, violated Petitioners' right to procedural due process under the law. Furthermore, this loss of the right to be heard on appeal of the original action is critical in view of Petitioners' presentment of more than ample evidence in the Bill of Review proceedings to justify the granting of a Motion for New Trial in the original action, had that opportunity been available.

2. Whether the participation of Court of Appeals Associate Justice Joe Spurlock at the trial court and appellate court proceedings relating to this matter denied Petitioners a fair hearing before an impartial tribunal as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution?

Petitioners further allege a denial of due process of law in the manner in which the Honorable Joe Spurlock participated, directly and indirectly, in the rendition of judgments at both the trial and appellate levels. Fundamental to the requirements of due process is the opportunity to be heard before a fair and impartial tribunal of some nature, composed of neutral and detached persons. *In Re Murchison*, 349 U.S. 133 (1955); see also, *Warren v. Nat'l Ass'n of Secondary School Principals*, 375 F. Supp. 1043 (N.D. Tex., 1974).

The entry of the Default Judgment in the trial court was by the Honorable Joe Spurlock, Judge of the 96th Judicial District Court, sitting for the 17th District Court of Dallas County, Texas. Between the entry of the Default Judgment and the filing of the Bill of Review, the Honorable Joe Spurlock assumed his position in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, Fort Worth, Texas, as an Associate Justice. An appeal from the denial of the Bill of Review was taken to the Court of Civil Appeals for the Second Supreme Judicial District of Texas. Upon the presentment of a Motion for Voluntary Recusal, Associate Justice Spurlock advised counsel for Crabbe and Campbell that he would voluntarily recuse himself from the proceeding. However, despite such offer of voluntary recusal, the Associate Justice Spurlock attended the hearing of this appeal, obstensibly in an official capacity, orally participated in the review of the facts and contentions, and otherwise exerted a potentially dominant influence in the manner in

which the court members received and evaluated the evidence and legal arguments presented by Petitioner. Such influence can be attributed largely to his frequent references to the Default Judgment proceedings, of which he was the direct participant, and the influx of his recollections and impressions gathered therefrom into the appellate proceeding.

The proposition that due process requires a fair hearing before an impartial tribunal is well established. *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (precuniary interest); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (contempt proceeding). More specifically, trial before an unbiased judge is essential to due process. *Johnson v. Mississippi, supra.* Petitioners do not seek to attribute any wrongdoing upon the Honorable Joe Spurlock for his participation at two levels of Petitioners' pursuit of legal remedy. Rather, Petitioners seek to protect their fundamental right to have their legal contentions reviewed before tribunals which are free from the possibility of pre-judgment, prejudice, bias or previous deliberation as to the relief sought. To perform its high function in the best way "justice must satisfy the appearance of justice" *Offutt v. United States*, 343 U.S. 11, 13 (1954). The spirit of the Fourteenth Amendment of the United States Constitution demands that such a right be accorded the utmost recognition to the end that a citizen be provided a full and fair hearing before a neutral and impartial tribunal at every step of the appellate structure. This right was not afforded to Crabbe and Campbell.

Petitioners do not overlook the disclaimer conspicuously set forth in the opinion rendered by the Court of Civil Appeals indicating that the Honorable Joe Spurlock took no part in the decision of the court. The disclaimer that he did not participate in the final decision does not, however,

vitiate the obvious influence exerted by Associate Justice Spurlock by his mere presence and participation in the hearing of such cause. "Due process requires, essentially, a full and fair hearing, before an impartial tribunal at a meaningful time and in a meaningful manner." *West Penn. Power Co. v. Train*, 522 F. 2d 302 (3rd Cir., 1975), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The partiality created by the presence and participation of Associate Justice Spurlock on the Court of Civil Appeals can be demonstrated by the following facts: (1) that he was a former law partner of Hord's attorney; (2) his natural desire, as the former trial judge, to see his judgments upheld; (3) the participation of a former trial judge in the decision-making process of a Court of Appeals; (4) that all of the requirements for the granting of a Bill of Review were met and presented; and (5) that the denial of the Bill of Review was contrary to current Texas law.

The additional participation of the Associate Justice Spurlock at the appellate level has deprived these Petitioners of their rights to a "full and fair hearing before an impartial tribunal * * * *in a meaningful manner*," as guaranteed under the Fourteenth Amendment to the United States Constitution. Petitioners respectfully contend that the interests of justice and the furtherance of the well-established Constitutional guarantee of due process of law require that they be permitted the opportunity to effectively present their claim before impartial tribunals, unhampered by the potential influence which eminates from the presence at successive judicial stages of the same judge who initially enters the judgment.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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By .....

Copies of the foregoing Petition for Writ of Certiorari were on the 1st day of February, 1977, served on Robert G. Guthrie, 212 Union Bank Building, Fort Worth, Texas, 76102, attorney for respondent.

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APPENDIX A

No. 17711

**IN THE COURT OF CIVIL APPEALS
FOR THE SECOND SUPREME JUDICIAL
DISTRICT OF TEXAS**

ROBERT CRABBE et al.

Appellants,

v.

GLEN D. HORD,

Appellee.

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

Robert Crabbe and Kenneth Campbell, hereinafter termed appellants, brought suit against Glen D. Hord, hereinafter termed appellee, seeking by bill of review to set aside a prior judgment rendered against them. Therein was an award of damages to Hord because of injuries sustained in a vehicular collision.

Trial of the bill of review case was to a jury which returned a verdict. Judgment, rendered upon the verdict, was in denial of the bill of review. Therefrom Crabbe and Campbell appealed.

We affirm.

Following the collision by reason of which appellee sustained personal injuries he brought his suit for damages on October 6, 1972. He did not sue appellant Campbell. He sued appellant Crabbe and another by the name of Melton, alleged at the time to have been the employer of Crabbe and liable under the doctrine of *respondeat superior*. After service of citation was obtained Melton obtained agreement of appellee to an indefinite extension of time within which to file an answer. September 6, 1973 appellee filed an amended petition in which he added appellant Campbell as a defendant, alleging that at time of the collision Crabbe was Campbell's agent, whereby Campbell would be liable under the doctrine of *respondeat superior*.

September 14, 1973 appellee revoked his agreement for extension of time within which to answer and requested that answers in response to the citations antecedent to September 6th be filed by September 24, 1973. September 28, 1973 an attorney filed an answer for Melton. No answer was ever filed for any other party. Melton's answer contained a demand for jury trial, and he paid the jury fee. The spurious "attorney" upon whose promises both appellants were relying, and who was deemed their agent by appellee and his attorney, acted — or rather failed to act — to the undoubted prejudice of the appellants, for had he performed as a proper fiduciary there no doubt would have been answers filed in behalf of both appellants.

October 17, 1973 appellee, without notice to either of the defaulting appellants, or to Melton, moved for and obtained an order severing the action against appellants from that against Melton. Melton alone remained as the defendant in the original suit under the original number. Appellee's suit against both appellants was docketed under the new number.

Under the new number appellee secured by default a joint and several judgment against the appellants. The evidence upon damages was heard by the court, without a jury, and default judgment was rendered in appellee's behalf for a substantial amount in damages.

The postcard notice required by T. R. C. P. 239a, "Notice of Default Judgment", was not sent to either appellant. This was through mistake or inadvertence on the part of the clerk, appellee having complied with his duties under that same rule. Appellants did not know that the default judgment had been taken against them until immediately before August 14, 1974. They were made aware of the judgment by an attempt to make levy of execution in satisfaction. Circumstances shown upon trial evidenced that delay in taking action prior thereto was excused and justified as to both appellants.

By their petition for bill of review appellants made a "two-pronged" attack upon the default judgment. By one theory the judgment was directly attacked on the premise that appellee was chargeable with having prevented their making answer to the action in which default judgment had been taken. By another theory they asserted unjustified denial of opportunity to timely file a motion for new trial. This was because of the clerk's failure to notify them as required by Rule 239a.

The special issues presented to the jury posed questions, answers to which might have shown that appellants were entitled to prevail on their bill of review. The answers did not suffice to so show this entitlement. No special issues were submitted in answer to which appellee might have established his right to recover damages in the event appellants had proved entitlement to prevail on the bill of review. The result was that appellee had "all his eggs in one basket"; where any

right of recovery which appellee might have possessed would be totally extinguished for "failure of proof" in the event appellants should establish their right to have the issues of appellee's original action retried.

Important to our disposition of the appeal is the law applicable to the test of propriety or impropriety of granting proper motions for new trial where complaint is of a default judgment. In such motions for new trial a movant must show either (1) that to grant the new trial would work no injury upon the party who has obtained the judgment, or (2) make an offer to "do equity" in the event a new trial be granted so as to make or keep such party whole by reimbursement of his expenses attendant to the trial pursuant to which he obtained the default, and otherwise to make compensation to him for whatever relief he might show as a proper demand. See 4 McDonald, Texas Civil Practice, 1971 Rev., p. 268, "New Trial", Sec. 18.10.2, "(Grounds for New Trial — After Judgment by Default or in Defendant's Absence, Equitable Grounds) —— (II) Requirements." Indeed, we have concluded that disposition of the appeal is controlled by law in this respect. It will be the subject of our discussion at a later point of this opinion.

Appellants are restricted to rules applicable to bill of review cases under T. R. C. P. 329b, "District and County Court Cases." They properly insist that in a test of their right to prevail under the peculiar circumstances of this case should be the same as in a case where the claim was of error in overruling a timely filed motion for new trial following entry of a default judgment. They contend that because of the failure on the part of the court clerk to mail the required notices that default judgment had been taken by Rule 329a their right to relief is shown. We agree that they were aggrieved and by the fact of the clerk's dereliction they

have established one element of their burden of proof. Petro-Chemical Transport, Inc., v. Carroll, 514 S.W. 2d 240 (Tex. Sup., 1974). The holding of the cited authority was relative to the effect of T. R. C. P. 306d, "Notice of Final Judgment or Other Appealable Order." The necessary effect of the holding in the case would nevertheless make the identical rule applicable to Rule 239a. The purpose of both rules is to insure that, insofar as practicable, parties adversely affected by a final judgment or other appealable order have an opportunity to attack the same by motion for new trial or appeal, which purpose would be unnecessarily thwarted if there can be no relief when the clerk, either intentionally or through oversight, fails to send the requisite notices promptly required by both rules.

It is in the decision of Hanks v. Rosser, 378 S.W. 2d 31 (Tex. Sup., 1964) that we find the applicable rules to be applied to the immediate bill of review case. The rules are a combination of those of Craddock v. Sunshine Bus Lines, 134 Tex. 388, 133 S.W. 2d 124 (1939) and of those of Alexander v. Hagedorn, 148 Tex. 565, 226 S.W. 2d 996 (1950). *Craddock* was an appeal from a default judgment where motion for new trial was timely filed. *Hagedorn* was not a case in which a motion for new trial was filed, for discovery of the fact that a default judgment was after time therefor could be permitted. It was an appeal from judgment in a later filed bill of review case. Interesting cases applicable to *Craddock* and to *Hagedorn* are Texas State Board of Examiners in Optometry v. Lane, 358 S.W. 2d 636 (Tex. Civ. App., Fort Worth, 1962, writ ref., n.r.e.); Kelly Moore Paint Co. v. Northeast National Bank, 426 S.W. 2d 591 (Tex. Civ. App., Fort Worth, 1968, no writ history); and Gracey v. West, 422 S.W. 2d 913 (Tex. Sup., 1968). These cases exhibit instances where freedom from negligence of a complain-

ant is shown where failure to take timely protective action is attributable to dereliction on the part of a court or its officials.

By the instant appeal the appellants must necessarily seek reversal by the rule of *Hanks* and found their claim upon the error in their deprivation of an opportunity to present a motion for new trial or to appeal from the default judgment. The necessity has resulted because the jury refused to make the findings requisite to appellants' entitlement to reversal of such judgment by the rule of *Hagedorn*. Had the findings been made appellants would not have the duty to offer to "do equity" as predicate to their right to relief. Relative thereto we note that the jury refused to find for appellants that either of them was prevented from making answer and contesting rendition of the default judgment before its entry as an appealable judgment by fraud, accident or wrongful act of the opposite party, unmixed with any fault or negligence of theirs. Had the appellants obtained the finding desired theirs would have been the victory. By the jury's refusal to find as the appellants desired the appellants, necessarily, must present their case as one in which their attack is upon denial of opportunity to move for a new trial. On this appellants claim they have established their case by the rule of *Hanks* and that there should have been a judgment entered on the jury's verdict for them because they had done so.

What is the rule of *Hanks*? As applied to the particular facts confronting the Supreme Court at time of the opinion it was stated that the controlling facts were: (1) whether the failure to file the answer was either intentional or the result of conscious indifference; (2) whether the defendant in default judgment was misinformed by the clerk within the time for filing the motion for new trial, and (3) was thus prevented from filing, or misled into not filing, his motion

in time; (4) whether such defendant in judgment had a meritorious defense; and (5) whether the plaintiff who had obtained the default judgment would not be caused to suffer injury by the granting of the bill of review.

In the instant case the appellants obtained jury findings that they had a meritorious defense, that their failure to file answer before the default judgment was taken was not intentional or the result of conscious indifference, and that they were not informed of the default judgment taken against them. Construably, there was also finding by the jury that the appellants were prevented from filing, or misled into not filing, a timely motion for new trial. Actually the finding was that they were deprived of an opportunity to timely protest the default judgment, and we deem such finding to be sufficient, to satisfy the requirements that they show that they were prevented from filing, or misled into not filing, a motion for new trial. This was because of the failure of the clerk to comply with Rule 239a.

To be observed, however, is the total absence of any jury finding upon element five (5) as denominated in *Hanks*, to-wit: that the plaintiff who had obtained the default judgment would not be caused to suffer injury by the granting of the bill of review. There was not a submission of any special issue to the jury on this element. Neither was there any request therefor or complaint because of a failure of submission.

Element five (5) has been written upon in *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W. 2d 124 (1939), and other cases where there was action of the court upon a motion for new trial filed after the taking of a default judgment. It is to these cases we must look in the determination of whether the trial court was correct in the conclusion that appellants failed to establish their right to prevail by their

bill of review, and in rendering judgment upon the verdict against their contentions.

In view of the absence of any issue in the verdict of the jury we must consider that if it was actually made an issue upon trial it should be deemed upon the appeal as having been found by the trial court in such manner as to support the judgment. T. R. C. P. 279, "Submission of Issues".

For our purposes we treat the issue as having been raised although by the evidence the only instance where we find the matter mentioned was a part of the testimony of Lancaster Smith, an attorney, when he stated that in his opinion, assuming that the cause of action of the appellee would be maintained, that appellee would not be caused to suffer injury by the court's granting appellants' bill of review. Of course, as expert testimony and furthermore clearly by way of opinion, the trial would not thereby be bound in any way as the fact finder upon the particular question by Rule 279.

In the pleadings we find nothing whatever relative to the aforementioned element five (5). At no point did appellants either allege that (1) to grant the bill of review would work no injury upon appellee, nor (2) did they at any stage offer to "do equity" and make or keep appellee whole by any reimbursement of his expenses attendant to trial where he obtained the default judgment, etc. It is made obvious that in the appellants' "two-pronged" attack upon the default judgment by their bill of review that they hoped to prevail by the rules of *Hagedorn*. Apparently they overlooked this particular element, essential by the rule of *Hanks*. As we understand *Hanks* the test to be applied to the element would be identical to those of *Craddock*. The inquiry is upon probable injustice relative to deprivation of right to file a motion for new trial, as distinguished from

inequity in the rendition of the default judgment itself. Therefore, in the test made upon appeal the situation is to be viewed as one where a motion for new trial had been filed in time for the trial court to have considered it and where the judgment is not void but is a valid and subsisting judgment unless and until it may be set aside with a new trial granted.

The inquiry constitutes matter considered in cases where the defendant appeared after default judgment had been entered but in time to file a motion for new trial; and where upon overruling the motion for new trial an appeal was taken. One such case is that of *Craddock*, itself, in which the following language appears: (133 S.W. 2d 124, 125) "Upon a hearing of the motion (motion for new trial) evidence was offered in support of all the material allegations therein contained. It was made further to appear upon the hearing that, if the judgment by default had been set aside on September 11, and a new trial granted, the plaintiff could have obtained a trial as soon as he could have done had an answer been filed before appearance day. It was also made to appear at the hearing that one of defendant's attorneys, on the date the motion was filed, offered, on behalf of his client, to pay the plaintiff all of the expenses incurred in obtaining the default judgment. In short, it was shown, at least prima facie, that, had the default judgment been set aside and the case tried in its regular order, the plaintiff would have been in no worse position than he would have been had an answer been filed prior to the rendition of the default judgment." In *Craddock* the judgment was reversed and the cause remanded for new trial.

Like action by the appellate court occurred in Ward v. Nava, 488 S.W. 2d 736 (Tex. Sup. 1972), in which the

court wrote (p. 738) as follows: —"* * * Ward has also stated in his motion that, if granted a new trial, he is willing to pay the expenses and costs of the hearing of this motion in the setting aside of such default judgment. These costs can be assessed against him by the trial court in a final judgment to be entered herein." Somewhat similar language is found in Reynolds v. Looney, 389 S.W. 100 (Tex. Civ. App., Eastland, 1965, writ ref., n.r.e.).

Contrary action, in that the appellate court refused to reverse the default judgment of the trial court, is to be observed in Griffin v. Duty, 286 S.W. 229 (Tex. Civ. App., Galveston, 1956, no writ history), where the court wrote (p. 233), as follows: "In our view defendant's failure to set up a meritorious defense in his motion is conclusive against his appeal, but it must be denied for the additional reason that he wholly failed to demonstrate — did not even attempt to demonstrate — that a new trial with consequent delay and additional expense to plaintiff would not work an inequitable injury to his adversary — an injury which defendant did not seek to mitigate by diligence in filing his motion and getting it up for hearing, nor by tendering to plaintiff his expenses incurred in connection with the first trial."

The most recent expression of the rule requiring equity of one who seeks relief from a default judgment is by the Supreme Court. United Beef Producers, Inc. v. Lookingbill, 532 S.W. 2d 958 (Tex. Sup., 1976). A case cited is that of Griffin v. Duty, supra.

In a recent instance where a local trial court granted a new trial following entry of a default judgment where the movant conceded that he did not suffer its entry through any fraud, accident or wrongful act of his opponent, we observed that part of the reason for granting a new trial

was the payment by the movant of $3,000.00, which plaintiff in judgment showed he would be damaged in the event the new trial should be granted. The trial court decided that such amount had been proved as expenses and damages of the party who had obtained the default judgment, and that its payment should be required as the equitable condition upon which the new trial was granted. This occurrence would seek to serve as an example of the requirement incumbent upon a movant seeking equitable relief from a judgment taken where he was not prevented from making answer and appearing for trial, and where the judgment by default was not due to any fault, accident or wrongful action of the opposite party, unmixed with any fault or negligence of his own.

We hold that the trial court did not err in rendering judgment upon the verdict returned by the jury, which lacked any finding that to grant the bill of review and order a new trial would work no injury upon the opposite party, and lacked any finding (there having been no offer of appellants to do equity) as to the entitlement of appellee in order to make him whole and restore his position in the event appellants' bill of review be granted.

Most of appellants' points of error are already covered by the discussion. These are overruled. Another, complaining of failure to submit a specially requested issue to the jury in the charge of the court inquiring whether the damages allowed by the default judgment was in excessive amount is overruled as immaterial.

Remaining is a point of error that the court erred in denying the bill of review because one of the defendants in the cause of action, as it existed prior to severance, had seasonably demanded a jury trial, and paid a jury fee, and that with the record in such state it was error for the damages upon

default to be awarded by the court without a jury. Appellants cite authority to the effect that payment of the jury fee by one party creates the entitlement to trial by jury (at least as to unliquidated damages) of all parties. We are convinced, for the particular purpose, the error, if any, was procedural merely. Even if as applied to a regular appeal there would have been reversibility because of the failure of a jury to assess the damages, which we neither are required to hold nor do we hold, yet there would not otherwise be reversibility, and, specifically, would not entitle appellants to prevail by their bill of review. Furthermore, by amendment effective January 1, 1971, the applicable procedural rule was amended by language certainly operating to effect a waiver of a right to jury trial by any party who has not himself paid a jury fee and is in default for failure to file answer and also failing to appear for trial. See T. R. C. P. 220, "Withdrawing Cause from Jury Docket", the last sentence, "Failure of a party to appear for trial shall be deemed a waiver by him of the right to trial by jury." The point is to be overruled for either of the above reasons.

Each point of error has been severally considered. All are overruled.

Judgment is affirmed.

APRIL 9, 1976

FRANK A. MASSEY
Chief Justice

Spurlock, A. J., not participating.

APPENDIX B
No. 17711

Filed in Court of Civil Appeals
For Second Supreme Judicial
District of Texas
November 23, 1976
Lida Swanson, Clerk

IN THE COURT OF CIVIL APPEALS
FOR THE SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

FORT WORTH, TEXAS

ROBERT CRABBE and
KENNETH CAMPBELL,
Appellants,

Vs.

GLEN D. HORD,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ROBERT CRABBE and KENNETH CAMPBELL, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of this Court affirming the Trial Court's judgment in favor of GLEN D. HORD, Appellee, which became final on November 3, 1976 when the Supreme Court of Texas denied the Appellants' Motion for Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2) and §1257(3).

Respectfully submitted,

VIAL, HAMILTON, KOCH, TUBB,
KNOX & STRADLEY
1500 Republic National Bank
Tower, Dallas, Texas 75201
748-4541

By: R. G. VIAL
Robert G. Vial

and

By: JEFFREY S. LYNCH
Jeffrey S. Lynch

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Notice of Appeal has been forwarded to Mr. Robert G. Guthrie, 212 Union Bank Building, Fort Worth, Texas 76102, attorney for Appellee, on this 22nd day of November, 1976.

JEFFREY S. LYNCH
Jeffrey S. Lynch

APPENDIX C

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of ROBERT CRABBE, ET AL VS. GLEN D. HORD, CASE NO. B-6083, was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX D

CLERK'S OFFICE — SUPREME COURT

November 3, 1976

Austin, Texas

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of ROBERT CRABBE, ET AL, VS. GLEN D. HORD, B-6083, was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk